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April 20, 2011

VIA E-MAIL

Mr. David T. Barker
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court
San Diego, CA 92123

Re: March 21, 2011 Tentative Order No. R9-2011-0022; NPDES Permit No. CAG999002; General National Pollutant Discharge Elimination System (NPDES) Permit For Residual Firework Pollutant Waste Discharges To Waters Of The United States In The San Diego Region From The Public Display Of Fireworks

Dear David:

The above referenced Tentative General Permit ("Order") covers residual firework pollutant waste to inland surface waters, enclosed bays and estuaries, harbors, lagoons, and the Pacific Ocean. The Order is scheduled for public hearing on May 11, 2011 by the California Regional Water Quality Control Board ("Regional Board") and shall become effective of June 1, 2011 and expire on May 31, 2016. The comments provided below are provided on behalf of my client, the San Diego Armed Services YMCA, for consideration by the staff and the Board prior to and at the hearing.¹

I. GENERAL COMMENTS

It should be recognized that the Regional Board's effort to regulate fireworks displays is novel and appears to be driven by a desire to protect the dischargers from the threat of a citizen suit as much as it is by the need to control the discharges. Because the Regional Board must make findings to justify the issuance of the Order, and because these findings must be supported by substantial evidence in the record, the Board will rely on the factual assertions and support

¹ The San Diego Armed Services YMCA is the not-for-profit charitable beneficiary of the Big Bay Boom Fourth of July fireworks display on San Diego Bay.

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provided by the staff reports and the record made at the public hearing. In its current state the evidence will not support issuance of the Order.

For example, the existing SeaWorld fireworks monitoring data tells us that at best it would take more than 100 years for a comparable once-a-year fireworks event to create water quality and sediment effects such as exist at SeaWorld.² Unlike the stagnant and shallow Mission Bay water, San Diego Bay is deeper and more dynamic and even for a 1,000 pound display, the extensive monitoring required (directly or collaboratively) for such a show cannot be justified. For the Board to impose such monitoring the burden, including costs, of this obligation must bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. While the Board may seek information from the discharger, it is constrained to do so only as may be reasonably required.³ Applying these principles to this case, there is no support to justify water quality and sediment quality monitoring of once a year firework demonstrations in San Diego Bay.

II. DISCHARGE CATEGORY

The Order applies to any person discharging fireworks over surface waters. However, for certain firework events it potentially includes additional and expensive requirements, (principally water quality and sediment quality monitoring and reporting). Whether these more strenuous and costly obligations apply depends on the geographical location of the discharge (San Diego Bay and Mission Bay). For these locations, the net weight of the fireworks discharged (1,000 pounds per year) and whether the display is considered to be a single event determine the imposition of the added burden. Yet, if a display discharges fireworks debris into surface waters other than those listed, no matter how many pounds of fireworks that are involved, the permit obligations are less strenuous. This result seems arbitrary and not consistent with water quality programs and policy.

III. SINGLE EVENT

This Order should treat each barge displaying fireworks as a separate event especially if these barges are located at a distance where water quality impacts create separate impacts, where the show is one time a year, and where each barge or the net explosive weight of fireworks on each barge is less than 1,000 pounds. The San Diego Bay barges are approximately one mile to ten miles apart, the discharge overlap edge effects, if any, are miniscule.

² It is reasonable to assume that the SeaWorld shows with less than 1,000 pound fireworks contribute to the cumulative impact identified in the Mission Bay monitoring of their major holiday fireworks events.

³ California Water Code sections 13267 and 13383.

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IV. NOI/NOE

Once a discharger files its notice of intent ("NOI"), the Regional Board has the opportunity through the notice of enrollment ("NOE") to include specific conditions not stated in the Order. We request that the Order include a notice and an opportunity to comment before special conditions are added to this Order.

V. CHEMICALS OF CONCERN

It is not clear why a discharger who exceeds 1,000 pounds net explosive weight would be treated differently if they were discharging over inland versus bay waters. This is particularly true since perchlorate seems to be a chemical of significant concern in regard to fireworks waste discharges. Perchlorate is a human health risk and subject to regulation under public health and federal drinking water standards. Since neither San Diego Bay nor Mission Bay is used for drinking water purposes it is inconsistent and illogical to impose the monitoring obligations on those areas when no such obligation is imposed on fresh water reservoirs.

VI. FALLOUT AREA

The Order defines the Fallout Area as "the area in which fireworks debris and pollutants fall after a pyrotechnic device is detonated. The extent of the Fallout Area depends on wind and the angle of mortar placement." The Order also contains a definition for Firing Range, "the Firing Range is that area over which fireworks may travel by design or accident and upon which fireworks pollutant waste may fall. It includes the fireworks launching area and adjacent shorelines, quays, docks and the fireworks Fallout Area." These definitions are vague and do not provide reasonable certainty or provide legally sufficient guidance to create and bind a discharger to the legal obligations established in the Order. Furthermore, they do not establish fair notice for purposes of compliance or enforcement. For example, on the 4th of July it is not only a barge operator who would be discharging fireworks, as history has shown there are many private parties as well as smaller fireworks events that can occur on that day. Creating an obligation based on a debris discharge area that may not be associated with a discharger's activity is placing a responsibility that is beyond the statutory reach of this Board. A person should only be liable for waste that they discharge and not for that of a third party. A more conservative approach to defining the Fallout Area and the Firing Range area that is both legally appropriate and fair is the definition used by the Coast Guard. The Coast Guard in its authorization for this event for the 4th of July Big Bay program employs a 300 meter radius, and it is more likely than not that it is within that radius that the bulk of fireworks discharge, if any, will occur.

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VII. APPLICATION FEE

The Regional Board has classified the fireworks activity as a Category 3 threat to water quality. That category is defined as “those discharges of waste that could degrade water quality without violating water quality objectives, or could cause a minor impairment of the designated beneficial uses.” It should be noted that the Regional Board does not know what amount, if any, of the net explosive material will actually result in discharge of the waste to the surface waters. The Regional Board itself recognizes the fireworks debris discharge is not likely to be a significant discharge.

As a result, the Regional Board established the minimal fee of \$1,200 plus a \$252 surcharge to be paid on an annual basis. If as the Order indicates there were 66 different events in San Diego Bay last year, and many of those are one time only events, the cost of filing 66 different NOIs becomes substantial. Thus, we ask that a single permittee such as the Port of San Diego be allowed to authorize all events within its jurisdiction. While the Board cannot order the Port to do that, we ask if this possibility would be acceptable to the Board.

VIII. THE FIREWORKS POST EVENT REPORT FORM

This form requires a map or diagram that identifies the Firing Range and adjacent shoreline, quays and docks and other appropriate features of the Firing Range and adjacent affected surface waters. Again, the uncertainty surrounding the definitions of the Firing Range and Fallout Area create a vague, overbroad and unreasonable burden without fair notice to the discharger as to what should be or reasonably be included in the scope of the area to be addressed in this report. Thus, limiting that area to 300 yards would make sense. The fireworks post event report also asks the discharger to indicate which fireworks were environmentally friendly. Yet the Order’s Definition section does not define environmentally friendly fireworks.

IX. ADDENDA

Finally, we note that the Order needs to add definitions for many terms which are now open to uncertainty and confusion. For example, what is the difference between discharger, sponsor, host and operator? Point source is not sufficiently interpreted nor applied to the unique nature of fireworks, which staff groups into three general categories. The definition for the term “net explosive weight” is not sufficient and leaves room for debate. The word “continuous” is not found in the definition section of the Order. There are other examples where clarity could be added to the Order by adding or modifying the Definition section.

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Thank you for the opportunity to provide these initial comments, and I request the right to include additional comments at the hearing on this Order.

Sincerely,

John J. Lormon

JJL/bb

cc: Paul Steffens
H. P. Purdon